No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF STEVE BULLOCK, GOVERNOR OF MONTANA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
State Capitol
1301 E 6th Avenue
Helena, MT 59601

KARL ENGLUND
Karl J. Englund, P.C.
401 North Washington Street
P.O. Box 8358
Missoula, MT 59807
(406) 721-2729

DEEPAK GUPTA
Counsel of Record
MATTHEW W.H. WESSLER
DANIEL TOWNSEND
Gupta Wessler PLLC
1900 L Street, NW
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amicus Steve Bullock, Governor of Montana

January 18, 2018

TABLE OF CONTENTS

Table of authorities ii

Interest of *amicus curiae* 1

Statement 1

Summary of argument 4

Argument 5

I. Montana's sovereign authority to structure its own government programs is well established. 5

II. Montana's longstanding reliance on its freedom to organize relations with its State labor force is constitutional. 11

A. A collective-bargaining system that includes exclusive representation and agency fees serves important State interests. 13

B. Montana has a strong interest in maintaining its system of exclusive representation. 15

Conclusion 18

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Allied Stores of Ohio v. Bowers,
358 U.S. 522 (1959) 12

Bonner School District No. 14 v. Bonner Education Association,
176 P.3d 262 (Mont. 2008) 10

Borough of Duryea, Pennsylvania v. Guarnieri,
564 U.S. 379 (2011) 12

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 12

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees,
481 U.S. 429 (1987) 7

Civil Service Commission v. National Association of Letter Carriers,
413 U.S. 548 (1973) 12

Communications Workers of America v. Beck,
487 U.S. 735 (1988) 8

Davenport v. Washington Education Association,
551 U.S. 177 (2007) 8, 9

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees,
466 U.S. 435 (1984) 8, 9

Emporium Capwell Co. v. Western Addition Community Organization,
420 U.S. 50 (1975) 8

Engquist v. Oregon Department of Agriculture,
553 U.S. 591 (2008) 6, 9, 12

Equal Employment Opportunity Commission v. Wyoming,
460 U.S. 226 (1983) 5, 6

First National Maintenance Corp. v. National Labor Relations Board,
452 U.S. 666 (1981) 8

Ford v. University of Montana,
598 P.2d 604 (Mont. 1979) 11

Garcetti v. Ceballos,
547 U.S. 410 (2006) 5, 12

Gregory v. Ashcroft,
501 U.S. 452 (1991) 6

International Association of Machinists v. Street,
367 U.S. 740 (1961) 7, 8, 9

Katzenbach v. Morgan,
384 U.S. 641 (1966) 12

Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949) 7

National Labor Relations Board v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 8

Railway Employees' Department v. Hanson,
351 U.S. 225 (1956) 7

Reeves, Inc. v. Stake,
447 U.S. 429 (1980). 13

Roth v. United States,
354 U.S. 476 (1957) 5

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973) 12

Teamsters Local No. 45 v. State,
724 P.2d 189 (Mont. 1986) 11

Texas v. White,
74 U.S. 700 (1868) 6

United Public Workers v. Mitchell,
330 U.S. 75 (1947) 12

Waters v. Churchill,
511 U.S. 661 (1994) 6

Statutes

29 U.S.C. § 151 7

29 U.S.C. § 157 11

29 U.S.C. § 158 7

29 U.S.C. § 159 (e)(1) 11

45 U.S.C. § 151 7

45 U.S.C. § 152 7

Mont. Code Ann. § 39-31-101 ..... 3, 10

Mont. Code Ann. § 39-31-201 11

Mont. Code Ann. § 39-31-208 11

Mont. Code Ann. § 39-31-208(5) 11

Mont. Code Ann. § 39-31-401(3) 4, 11

Miscellaneous

14 Men Shot in Butte Strike, Great Falls Daily Tribune, Apr. 22, 1920..... 2

A.C.M. Gunmen Under Personal Direction of Roy Alley Shoot Down Miners In Cold Blood on Anaconda Rd, The Butte Daily Bulletin, Apr. 22, 1920..... 2

Alley Openly Urges Murder, The Butte Daily Bulletin, Apr. 20, 1920..... 2

Dan Boyce, *Montana's State-Run Free Clinic Sees Early Success*, Montana Public Radio, July 30, 2013..... 15

Dan Boyce, *Senate Passes First State Employee Base Pay Raises in Four Years*, Montana Public Media, Apr. 16, 2013..... 14

Butte Shocked by Unwarranted Slaughter of Unarmed Workers by Alley and A.C.M. Gun-Thugs, The Butte Daily Bulletin, Apr. 22, 1920. 1

Collective Bargaining Agreement Between Montana Public Employees Association and the Montana University System, July 1, 2013 through June 30, 2015..... 13, 14

Susan Dunlap, *Health Center for State Employees Opens in Anaconda*, The Montana Standard, Mar. 19, 2015. 15

First of Victims of A.C.M. Murderers To Die Shown Last Honor, The Butte Daily Bulletin, Apr. 28, 1920. 2

Hearing on H.B. 13 Before the Montana House Appropriations Committee (January 23, 2013) 15, 16

Robert Hebdon and Robert Stern, *Do Public-Sector Strike Bans Really Prevent Conflict?*, Industrial Relations, Vol. 42, No. 3 (July 2003). 14

Charles Johnson, *Barrett Working with Unions to Put Pension Funds to Work*, Montana Standard, Mar. 29, 2005. 15

Charles Johnson, *Right-to-Work Bill Draws No Support Except for Sponsor*, Missoulian, Feb. 23, 2015. 17

State and Union Official Discuss Investing Union Funds, Associated Press, Mar. 29, 2005. 15

The Federalist No. 45 (James Madison) (C. Rossiter ed. 1961) 6

Dave Walter, *More Montana Campfire Tales: Fifteen Historical Narratives* (2002) 1, 2

Jeffrey Zax and Casey Ichniowski, *The Effects of Public Sector Unionism on Pay, Employment, Department Budgets, and Municipal Expenditures*, in *When Public Sector Workers Unionize* (1988). 14

INTEREST OF *AMICUS CURIAE*[1]

Steve Bullock, the Governor of Montana, files this brief to inform the Court about Montana's unique labor history and explain how the State's sovereignty is at stake in this case. Montana's collective-bargaining system has been crucial to ensuring labor peace in the State's public sector and to securing essential public services for all Montanans. Governor Bullock files this brief as the State's chief executive, charged with supervising the conduct of the executive officers he appoints and the administration of the departments those appointees oversee. As chief executive, he has a strong interest in avoiding the significant disruption that would occur if agency-fee arrangements were invalidated by this Court.

STATEMENT

In the dying light of late afternoon on April 21, 1920, hundreds of miners gathered on Anaconda Road—outside the Anaconda Copper Mining Company's Neversweat Mine, just a few blocks east of the courthouse in Butte, Montana—to strike. Their demands were straightforward: higher wages, an eight-hour day, and an end to "rustling cards," a work-permitting system that allowed employers to blacklist workers from the mines.[2]

Tensions that day were already high. The previous morning's copy of the *Butte Daily Bulletin* reported that

---

[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission.

[2] *Butte Shocked by Unwarranted Slaughter of Unarmed Workers by Alley and A.C.M. Gun-Thugs*, The Butte Daily Bulletin, Apr. 22, 1920, http://1.usa.gov/1HyDXt0; Dave Walter, *More Montana Campfire Tales: Fifteen Historical Narratives* 215–17 (2002).

a company lawyer and the mine owner's personal secretary had suggested that "some more killings and hangings" would swiftly end any unrest.[3] And the county sheriff had "deputized" mine guards in an effort to contain the strike.[4] For their part, the striking miners prevented any willing workers from entering the mine—possibly with threats of violence. Several skirmishes broke out across the picket line.[5]

Strike leaders, company management, and police tried to mediate the dispute. Several times, the miners began to disperse only to be called back by their leaders. It was hard to know if progress was being made. Then, suddenly, gunfire rang out as bullets ripped through the crowd. All told, over a hundred shots were fired. People fled from the violence, but at least fourteen mine workers were shot, and one died.[6] Eyewitness and newspaper accounts yield no clear consensus on who shouldered the blame for what is known in Montana lore as the "Anaconda Road Massacre."[7] The culprits were never punished.

Montana has a rich and unique labor history. Some of the earliest unions in the country were founded in the

---

[3] *Alley Openly Urges Murder*, The Butte Daily Bulletin, Apr. 20, 1920, http://1.usa.gov/1MAyy4Y.

[4] *A.C.M. Gunmen Under Personal Direction of Roy Alley Shoot Down Miners In Cold Blood on Anaconda Rd*, The Butte Daily Bulletin, Apr. 22, 1920, http://1.usa.gov/1Y4vjH4.

[5] *14 Men Shot in Butte Strike*, Great Falls Daily Tribune, Apr. 22, 1920, http://1.usa.gov/1llXHq1.

[6] *First of Victims of A.C.M. Murderers To Die Shown Last Honor*, The Butte Daily Bulletin, Apr. 28, 1920, http://1.usa.gov/1HyEtHs.

[7] Walter, *Fifteen Historical Narratives* at 215–17.

mines outside of Butte. And the Butte Teachers Union, AFT Local No. 332, negotiated the *first* public-employee labor agreement in America in 1935. Yet, for years, labor unrest plagued the State. A patchwork of fractious and competitive unions long dotted the public- and private-sector landscape, making it difficult for employers—the State included—to effectively negotiate terms and conditions for their workers. Paralyzing strikes and work stoppages were commonplace. Although the Anaconda Road Massacre was one of the State's bloodiest strikes, it was by no means its last.

In the 1970s, the State went hunting for a better system. Like many other States, Montana turned to the federal model of collective bargaining, first adopted by Congress in the 1930s, as a template that could be tailored to fit the State's particular needs. Under this scheme, a process of collective bargaining founded on exclusive representation governs labor relations. To protect the effective operation of the exclusive representation system, federal law also authorized "agency shop" agreements requiring all represented employees to pay fees to cover costs of collective bargaining. These fees, however, could only be used to compensate the union for actual collective-bargaining-related activities; they could not fund unrelated political lobbying.

In 1973, Montana adopted a similar approach for its State employees. In its view, a framework patterned on the federal system would "promote public business by removing certain recognized sources of strife and unrest" and encourage "the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101. As under federal law, when a majority of public employees in an administratively determined bargaining unit vote to unionize, that

union becomes the exclusive representative of those employees.

But, as one would expect in a federalist model of government, Montana's system differs from that of California and other states in certain respects. For example, although agency fees are permitted, they are not mandated in Montana; through a collective-bargaining process, parties may mutually agree to add or strike such a requirement from their contract. Mont. Code Ann. § 39-31-401(3).

In the forty-plus years since its enactment, Montana's public sector collective-bargaining system has delivered on its promise. It has allowed Montana to provide uninterrupted public services—from education to prisons to snow removal—at considerably lower cost than the national average.

Montana remains firmly committed to its model collective-bargaining system for public employees. Although the Legislature often considers other regulatory options—a right-to-work bill, for instance, has been introduced in nearly every legislative session for years—Montanans of every political and economic stripe have roundly rejected these efforts for one main reason: Public unions now play a fundamental role in Montana's ability to govern itself effectively and efficiently.

SUMMARY OF ARGUMENT

Under our system of dual sovereignty, States are endowed with all the functions essential to a separate and independent existence. Chief among these functions—elevated above even the authority to regulate its citizens—is a State's power to structure labor relations with its employees. That interest is, as Justice Powell put it, "as sovereign a power as any a State possesses."

EEOC v. Wyoming, 460 U.S. 226, 269 n.5 (1983) (Powell, J., dissenting).

This Court has long recognized that the core challenge of establishing an appropriate, State-specific labor-relations system is best left to the wisdom of the States. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222–23 (1977). Not only does that judgment reflect the interests at stake when a State acts as employer, but it advances one of the key lessons of federalism—that "one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories." *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J., concurring and dissenting).

Montana has faithfully relied on these lessons. In 1973, it chose to establish a labor-relations system for public-sector employees premised on the model embodied in the National Labor Relations Act. And the system has worked: After many years of labor unrest, Montana has now experienced decades of labor stability in the public sector. The First Amendment does not prohibit this type of State-management decision. Instead, this Court has recognized that public employers may regulate even core First Amendment activities when they have sufficient interest as an employer in doing so. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). Montana's interest—as employer—in tailoring its public-employment labor-relations system to its needs more than justifies a modest intrusion into a public employee's speech activities.

ARGUMENT

I. Montana's sovereign authority to structure its own government programs is well established.

A. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the

States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This foundational principle offers "numerous advantages." *Id.* at 458. It "assures a decentralized government," encourages "more innovation and experimentation in government," and "makes government more responsive by putting the States in competition for a mobile citizenry." *Id.*

Although one can "fairly dispute" whether, in certain respects, our "federalist system" has succeeded, there is "no doubt about its design." *Id.* at 459. States are "endowed with all the functions essential to separate and independent existence." *Texas v. White*, 74 U.S. 700, 725 (1868). As James Madison put it, the "powers reserved in the State governments" extend "to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist* No. 45, pp. 292–93 (C. Rossiter ed. 1961).

Of those powers reserved to States, the authority to structure labor relations with its employees "is as sovereign a power as any that a State possesses." *EEOC v. Wyoming*, 460 U.S. 226, 269 n.5 (1983) (Powell, J., dissenting). This Court has "long held" that the "government as employer" has "far broader powers than does the government as sovereign." *Engquist v. Or. Dep't of Ag.*, 553 U.S. 591, 598 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). A State's "extra power" to regulate its labor relations derives from "the nature of the government's mission as employer." *Waters*, 511 U.S. at 674. To do its job, State governments must hire workers, and, to do that well, the State must be allowed to structure its labor relations "as effectively and efficiently as possible." *Id.* at 675.

B. That is why both Congress and this Court have repeatedly recognized not only that States retain broad authority over the basic structures of State and local labor relations, but also that exclusive-representation labor models accompanied by "agency-fee" authorization are appropriate. *See, e.g.*, 29 U.S.C. § 151, *et seq.* (National Labor Relations Act) (specifically excluding State governments from the term "employer"); 29 U.S.C. § 158, *et seq.* (LMRA) (same); *Lincoln Federal Labor Union No. 19129, Am. Fed'n of Labor v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222–23 (1977).

1. Congress was first to act. Beginning in 1926, "[f]ollowing decades of labor unrest" in the railroad industry, Congress passed the Railway Labor Act, 45 U.S.C. § 151, to "create[] a system for dispute resolution." *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 444 (1987). At the heart of this system was a model of exclusive representation: "[I]n recognition of the expenses and burdens incurred by the unions," the RLA enabled workers to select one union that would serve as their exclusive representative in collective-bargaining negotiations. The law also imposed a corresponding duty on the union to represent all employees fairly, in good faith, and without discrimination. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 750–60 (1961). As amended, the RLA specifically authorizes "union-shop" arrangements and includes provisions requiring workers to pay fees to the union designated as their exclusive-bargaining representative as a condition of continued employment. 45 U.S.C. § 152; *see also Ry. Emp. Dept. v. Hanson*, 351 U.S. 225, 231 (1956).

Congress carried that framework forward when, in 1935, it passed the National Labor Relations Act—one of

the most far-reaching federal laws regulating private-sector labor relations. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by fostering a collective-bargaining process. And Congress once again selected a system founded on exclusive representation as the best model for achieving labor peace. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674–75 (1981). To protect the effective operation of the exclusive-representation system, the NLRA also authorized "agency shop" agreements requiring all represented employees to pay fees to cover costs of collective bargaining. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744–45 (1988). But these agency fees could not fund unrelated political lobbying; instead, they could only compensate the union for actual collective-bargaining-related activities. *Street*, 367 U.S. at 749.

2. This Court, too, has repeatedly recognized the important interests in exclusive representation in both the private and public sectors. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975); *Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Emps.*, 466 U.S. 435, 448 (1984); *see also Abood*, 431 U.S. at 220–21; *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007).

On the federal side, this Court has shown unwavering support for the exclusive-representation approach. In *Street*, for instance, the Court explained that exclusive representation gives unions "a clearly defined and delineated role" in "stabilizing labor relations in [an] industry." 367 U.S. at 760. Its "purpose" is to "secur[e] self-adjustment" between an "effectively organized" industry

and an "equally effective" union while eliminating the problem of inter-union rivalries, which "undermine" employees' "participation in the process of collective bargaining." *Id.* at 759–760. Exclusive representation accomplishes these objectives, this Court has held, by conferring upon one designated union "the status of exclusive representatives in the negotiation and administration of collective agreements," and entitling it to "representation on the statutory board to adjudicate grievances." *Id.* at 760.

So too with the funding mechanisms that exclusive-representation models employ. "Performance of [a union's] functions" as an exclusive bargaining representative "entails the expenditure of considerable funds." *Id.* To comprehensively "perform[] their duties" in the scheme, "fairness justified the spreading of the costs to all employees who benefited." *Id.* at 761. Eliminating the "free rider" problem is, therefore, an "essential justification" for union fees. *Ellis*, 466 U.S. 447. But this Court has confirmed Congress's requirement that chargeable activities must be germane to collective-bargaining activity; they cannot include unrelated political lobbying. *Street*, 367 U.S. at 764.

And, when it comes to State decisions to "authorize a union and a government employer to enter into" exclusive-representation agreements, this Court has been no less clear: They are legitimate exercises of a State's authority to "regulate [its] labor relationships." *Davenport*, 551 U.S. at 181. After all, "[t]he desirability of labor peace is no less important" either at the State level or within the public sector. *Abood*, 431 U.S. at 224. In fact, a State's interest in "effectively and efficiently" managing its workforce—when it "acts as employer," in other

words—is "elevated" even over its interests when it "acts as sovereign." *Engquist*, 553 U.S. 598.

For States that establish "rights parallel to those protected under federal legislation," the "interests" supporting such a regime are "much the same as those promoted by similar provisions in federal labor law." *Abood*, 431 U.S. at 223–224. The "confusion and conflict" that would arise if "rival" unions "each sought to obtain the employer's agreement" are "no different in kind from the evils" diagnosed in federal contexts. *Id.* And the "risk of 'free riders'" is no "smaller." *Id.* So States remain free to use exclusive-representation models, including agency-fee rules, that are patterned on those sanctioned under federal law. *Id.* at 231–32.

C. Montana has faithfully applied these lessons at home. In 1973, after decades of unsettled labor relations, the State established a comprehensive public-sector labor-relations scheme designed to "promote public business by removing certain recognized sources of strife and unrest." 1973 Mont. Laws Sec. 1, Ch. 441; codified at Mont. Code Ann. § 39-31-101 (2017). The law's objective was to "encourage[] the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." *Id.*

And Montana found that federal law provided an attractive blueprint: While not identical, the Montana Collective-Bargaining Act (MCA) is patterned on the NLRA. *See Bonner School Dist. No. 14 v. Bonner Educ. Ass'n*, 176 P.3d 262, 265–67 (Mont. 2008) (using the NLRA as an "aid to interpretation"). Under the MCA, rank-and-file employees of State and local governments enjoy rights parallel to those protected under federal legislation: the rights to organize themselves; to join,

form, and assist a labor organization; to bargain collectively; and to engage in secret-ballot representation elections. *Compare* § 39-31-201, § 208 *with* 29 U.S.C. § 157, § 159 (e)(1).

The similarities between the MCA and federal law don't end there. In Montana, as under federal regimes, when a majority of employees of an administratively determined bargaining unit vote to unionize, that union is designated the exclusive representative of those employees. § 39-31-208(5). The chosen exclusive representative must also comply with a duty of fair representation to all employees in the unit, whether or not they are union members. *See Ford v. University of Montana*, 598 P.2d 604 (Mont. 1979); *Teamsters Local No. 45 v. State*, 724 P.2d 189 (Mont. 1986).

And, like federal frameworks, Montana law also permits public employers and unions to enter into collective-bargaining agreements containing agency-shop clauses. *See* § 39-31-401(3). But agency fees are permissive—not mandatory—in Montana. Through a collective-bargaining process, parties may mutually agree to add or strike such a requirement from their contract. *Id.*

II. Montana's longstanding reliance on its freedom to organize relations with its State labor force is constitutional.

The petitioner asks this Court to upend forty years of carefully calibrated State labor policy that, as in Montana, has helped bring about peace after years of labor unrest and improved government services. No law or policy justifies such an extreme step.

To the contrary, this Court has repeatedly sought to *limit*—not expand—those constitutional challenges lodged against State action. When "interpreting any . . . pertinent constitutional provision" in such a case, courts

must address the "foremost consideration"—"maintenance of the principles of federalism"—before invalidating State action. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530, 532 (1959) (Brennan, J., concurring); *Katzenbach v. Morgan*, 384 U.S. 641, 659, 661 (1966) (Harlan, J., dissenting)). And, as this Court explained in *San Antonio*, "it would be difficult to imagine a case having a greater potential impact on our federal system" than one seeking to "abrogate systems . . . presently in existence in virtually every State." *Id.*

These concerns are particularly evident when it comes to matters of State government. In similar settings, this Court has rightly blanched at constitutional interpretations that would "subject a wide range of governmental operations to invasive judicial superintendence." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 390–91 (2011). And so the Court has "often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. 599.

That leeway, moreover, does not diminish for claims raising First Amendment challenges of the sort advanced here. Quite the opposite: Public employers may regulate even core First Amendment activities when they have sufficient interest as an employer in doing so. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Were it otherwise, the First Amendment could be used to blue pencil all manner of State management decisions—an outcome roundly "inconsistent

with sound principles of federalism and separation of powers." *Garcetti*, 547 U.S. at 423.

Ultimately, Montana's interest as employer in tailoring the structure of its labor relations to the needs of its workforce and citizenry more than justifies the modest intrusion into a public employee's speech activities. There is no one "preferred" system for matters of State labor policy. Instead, States have used their regulatory flexibility to fashion "effective and creative programs for solving local problems." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). Montana's longstanding and effective choices in this regard should be celebrated, not maligned.

A. A collective-bargaining system that includes exclusive representation and agency fees serves important State interests.

Decades ago, Montana made the decision that collective bargaining in the public sector would advance government employers' managerial interests. Forty years on, that decision remains sound: Montana's collective-bargaining system has resulted in numerous advantages for both the State and public employees alike.

To begin, Montana's system of exclusive representation has consistently promoted labor peace and predictability. It allows employers to gain employee input into the terms and conditions of employment more efficiently than bargaining with individual workers or rival groups. Consider, for instance, Montana's use of "Labor Management Committees." *See* Collective Bargaining Agreement Between Montana Public Employees Association and the Montana University System, July 1, 2013 through June 30, 2015, http://bit.ly/1kMIZI9. By incorporating these committees into their agreements, parties "facilitate communication and resolve issues of mutual

interest" before they become costly subjects of litigation. *Id.* at 3. Other facets of Montana's system perform similar functions. *See id.*

The result has been to lower costs for the State and promote labor stability. For the four years after the Great Recession of 2008, State employees in Montana did not receive an across-the-board base-pay increase. In fact, in 2009 State employees came to the bargaining table and agreed to a two-year pay freeze to help Montana weather the impacts of the country's economic downturn. Dan Boyce, *Senate Passes First State Employee Base Pay Raises in Four Years*, Montana Public Media, Apr. 16, 2013, http://bit.ly/2rjkNWb. It is not surprising, then, that in States like Montana, "total general expenditures of the municipality are not increased by bargaining units, implying that some other components of the expenditures of municipalities . . . will be lower when bargaining units are present in municipal functions." Jeffrey Zax and Casey Ichniowski, *The Effects of Public Sector Unionism on Pay, Employment, Department Budgets, and Municipal Expenditures*, in *When Public Sector Workers Unionize* 323, 324 (1988).

Systems like Montana's are associated with lower rates of strikes or other work stoppages. "When compared with laws that permit limited strikes, job actions were higher in States that had no law or no finality in the law." Robert Hebdon and Robert Stern, *Do Public-Sector Strike Bans Really Prevent Conflict?*, Industrial Relations, Vol. 42, No. 3, 495 (July 2003). In fact, state-level public-employee strikes in Montana are a rarity: the State has not experienced one in over two decades.

And the collective-bargaining system delivers substantial, tangible benefits to public workers. For instance, in 2012, the State and its public-employee unions

set up the Montana Health Center, a health clinic especially for State employees. This clinic was widely hailed as the first of its kind in the country—offering free primary healthcare services to its government workers without copays. Susan Dunlap, *Health Center for State Employees Opens in Anaconda*, The Montana Standard, Mar. 19, 2015, http://bit.ly/1HKGw6a. By structuring flat-fee payments and increasing access to primary, preventive care, the center immediately began "saving money" for the State and is projected to save Montana millions in long-term health costs for its workers. Dan Boyce, *Montana's State-Run Free Clinic Sees Early Success*, Montana Public Radio, July 30, 2013, http://n.pr/1MAzeHz.

Montana's collective-bargaining system has also produced innovative infrastructure support for Montana communities. A decade ago, the governor worked with public unions to invest union pension funds in economic development projects across the State. *State and Union Official Discuss Investing Union Funds*, Associated Press, Mar. 29, 2005, http://bit.ly/1PClYTV; Charles Johnson, *Barrett Working with Unions to Put Pension Funds to Work*, Montana Standard, Mar. 29, 2005, http://bit.ly/1HyFXBz.

B. Montana has a strong interest in maintaining its system of exclusive representation.

1. Overturning Montana's longstanding collective-bargaining framework would generate massive costs for the State. Five years ago, the Administrator of the State Human Resources Division and the Governor's Chief Labor Negotiator told Montanans that the State must do more "[t]o attract and retain a competent workforce." *Hearing on H.B. 13 Before the Montana House Appropriations Committee* (January 23, 2013) (testimony of

Paula Stoll at 3), available at http://bit.ly/1MKE4xV. If the State couldn't "become an employer of choice," the "safety" and "public health" of "Montana citizens," would be at risk, as would the "quality of services Montana's citizens receive." *Id.* Growing demand for public services, combined with an aging workforce, meant that the State was "at a precipice." *Id.*

Upsetting the current scheme could push Montana off that cliff. Agency fees are crucial for attracting a competent workforce; eliminating them would weaken the communication channels that workers currently use to advocate for better working conditions, in turn undermining the State's ability to compete for the best workers. Montana is already losing employees at an unsustainable level. State employees are retiring "at record rates"—in 2012 the number of retiring workers increased by a full 25% from 2009. *Id.* at 2. Current turnover is already high—averaging around 13% over the last five years—and costly: Every employee that leaves costs the State up to one-and-a-half times the annual salary to replace. And that doesn't account for "the resulting loss in service or the increased liability of an untrained workforce." *Id.* at 3; *see also* Montana State Human Resources Division, State of Montana Employee Profile 2016, at 6, http://bit.ly/2mNr5c8. Forcing the State to restructure its collective-bargaining system will only make it harder to replace those losses with competent workers.

2. Montana's labor roots run deep. Unions have been part of the State's history since the late nineteenth century, and their place in the State has consistently weathered changing political tides. The State legislature has, for years, considered—and rejected—a right-to-work bill in nearly every session. And since the MCA was enacted

in 1973, no governor—Republican or Democrat—has ever supported, much less advocated for, a change to the public-sector collective-bargaining framework.

The current system, in short, works for Montana. Indeed, one need look no further than the response to one recent effort to adopt a right-to-work bill to see that Montanans from across the political and economic spectrum understand the importance of Montana's current collective-bargaining system. After House Bill 462—designed to repeal Montana's agency-fee provision for public employees—came up for debate in 2015, a groundswell of opposition emerged. Not only were the unions and State workers opposed to the bill, but industry was as well. *See* Charles Johnson, *Right-to-Work Bill Draws No Support Except for Sponsor*, Missoulian, Feb. 23, 2015, http://bit.ly/1JHxTih.

In *Abood*, this Court explained that a model of exclusive representation serves several important interests: It "avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment," prevents "inter-union rivalries," minimizes "dissension within the work-force," and "permits the employer and a single union to reach agreements and settlements." 431 U.S. at 220-21. Montana's experience demonstrates *Abood*'s wisdom; the State has long benefited from these advantages in its collective-bargaining system. They should not be so easily discounted.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
MATTHEW W.H. WESSLER
DANIEL TOWNSEND
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

RAPHAEL GRAYBILL
Chief Legal Counsel
Office of the Governor
State Capitol
1301 E 6th Avenue
Helena, MT 59601

KARL ENGLUND
Karl J. Englund, P.C.
401 North Washington Street
P.O. Box 8358
Missoula, MT 59807
(406) 721-2729

January 18, 2018